

**China's Socialization in the International Human Rights Regime: Why Did China Reject
the Rome Statute of the International Criminal Court? †**

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Abstract

This paper uses a hard law—the Rome Statute of the International Criminal Court—to examine the depth of China's socialization in the international human rights regime and the relative weights of sovereignty and human rights norms in determining China's policy choices. It shows that the reasons for China to reject the Rome Statute are two-fold. On one hand, Chinese leaders have not fully internalized human rights norms, and they still prioritize state sovereignty over human rights when making decisions. On the other hand, the legalized Rome Statute sets up an independent court with mandatory jurisdiction and grants the Prosecutor the ex officio right to investigate a crime. Such treaty provisions may have negative impacts on China's core sovereignty of territorial integration and regime security and impose high sovereignty costs on China. Therefore, China resolutely voted against the Rome Statute, even if such an action made it a small minority outside the international mainstream. These findings indicate that China is still in a weak socialization stage and is not able to take on binding human rights and humanitarian obligations with high sovereignty costs.

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Introduction

China has become an active participant and enthusiastic member in many international economic and political institutions at both global and regional levels since the mid-1990s. It is more integrated with the world than ever in its history. In the human rights issue area, studies show that China has become more cooperative and open to international common practices and standards, and that China's approach toward state sovereignty has also softened over time.¹ For example, in contrast to its original critical view of the United Nations (UN) peacekeeping operations in the 1980s, China has gradually changed its attitude and become an active supporter and participant in those operations.² It also signed almost all major multilateral human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).³ These behaviors have been viewed as evidence of China's gradual integration with the international human rights regime.

However, in the same year of China signing the ICCPR, it voted against the Rome Statute of the International Criminal Court (ICC)—the only legalized international human rights treaty with

¹ See for example, Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999); Rosemary Foot, *Rights beyond Borders: The Global Community and the Struggle over Human Rights in China* (New York: Oxford University Press, 2000); Allen Carlson, *Unifying China, Integrating with the World: Securing Chinese Sovereignty in the Reform Era* (Stanford, California: Stanford University Press, 2005).

² Jing Chen, 'Explaining the Change in China's Attitude toward UN Peacekeeping: A Norm Change Perspective', *The Journal of Contemporary China*, 18 (58), (2009), pp.157-173.

³ Dingding Chen, 'China's Participation in the International Human Rights Regime: A State Identity Perspective', *The Chinese Journal of International Politics* 2 (3), (2009), pp. 399-419.

mandatory delegation mechanism at the global level. The treaty was adopted by 120 states in favor, with twenty-one abstentions and seven nations against. China was among a small minority group casting a negative vote at the Rome Conference.⁴ Its flat rejection of the treaty is rather unusual, given that China concerns greatly about its “international image”, and the normal pattern of its approach to multilateral cooperation has been non-obstruction. For example, China’s voting behavior in the United Nations Security Council (UNSC) has usually been “restrained, measured and largely acquiescent”.⁵ In terms of negotiating and signing international treaties, China rarely takes direct confrontational stance to reject an international agreement widely supported by both developed and developing countries. As China’s Deputy Head of the Delegation to the Rome Conference, Liu Daqun, pointed out, the Rome Statute was the only multilateral treaty that China voted against.⁶

This paper addresses this anomaly of China’s approach to international institutions: why did China take a non-cooperative stance on the Rome Statute when it began to strengthen its ties with all types of international institutions in the late 1990s? It argues that the reasons for China’s non-cooperative stance on the Rome Statute are two-fold. On one hand, Chinese leaders still prioritize state sovereignty over human rights and thus are unwilling to take on binding legal obligations with high sovereignty costs. On the other hand, the legalized Rome Statute set up an independent court with mandatory jurisdiction and grant the Prosecutor the *ex officio* right to investigate a crime. Such treaty provisions may have negative impacts on China’s core

⁴ The other six countries voting against the Rome Statute are Iraq, Israel, Libya, Qatar, United States, and Yemen.

⁵ Joel Wuthnow, *Beyond the Veto: Chinese Diplomacy in the United Nations Security Council*, PhD. Dissertation (New York: Columbia University, 2011), p. 32.

⁶ Daqun Liu, ‘Preface’, in Shiguang Li, Daqun Liu and Yan Ling eds., *Guoji xingshi fayuan luoma guiyue pingshi [A Study on the Rome Statute of the ICC]* (Beijing: Peking University Press, 2006), p. 1.

sovereignty and impose high sovereignty costs on China. Therefore, China resolutely voted against the Rome Statute, even if such an action makes it a small minority outside the international mainstream.

These findings add to the literature on China's integration with the world. Prior literature in general views China as being gradually socialized by international norms and will continue to do so over time, but does not adequately address the *quality* of its socialization, because most studies focus mainly on China's pro-social changes in soft institutions, which do not allow enough observations of its behaviors in high sovereignty-costs settings. This study uses a high-cost hard law to examine the *depth* of China's integration and the *relative weights* of different international norms in determining China's foreign policy. It indicates that China is still in a weak socialization process and will sign international treaties only when its core sovereignty of territorial control rights and regime security is not at stakes. Given that Chinese leaders often perceive its core sovereignty as being threatened by the spread of human rights norms, China's socialization in the human rights regime is not a linear process. It is unlikely to fully internalize those norms, accept the Rome Statute, and move from weak to strong socialization in the foreseeable future.

This article begins with a discussion of the hard-law features of the Rome Statute and the significance of using such a setting to examine China's integration with the international society. It then provides an overview of China's official positions on major treaty provisions and briefly discusses the process of negotiating the treaty from 1993 to 1998. In the following section, it turns to an analysis of former President Jiang Zemin's discourses on human rights from 1989 to 2000 and suggests that concerns about China's territorial integrity and regime legitimacy have greatly restrained Chinese leaders' acceptance of human rights norms. Finally, the article focuses

on the implications of major treaty provisions on China's core sovereignty and then draws a conclusion regarding China's socialization in the international human rights regime.

The significance of the hard law nature of the Rome Statute

The Rome Statute of the International Criminal Court (ICC) is by far the only "hard law" in the international human rights and criminal law areas at the global level. One major contribution of the treaty is that it creates an independent ICC, a permanent court with inherent and compulsory jurisdiction over four types of core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. It also grants prosecutors the *ex officio* right to investigate a crime not only based on referrals by states or the UNSC, but also in response to information provided by individuals and NGOs.

The mandatory delegation mechanism of the Rome Statute and a strong, independent ICC reflect an ongoing legalization trend of world politics. Highly legalized treaties are hard law in that they define rules unambiguously, bind states strongly, scrutinize their behaviors through international and domestic legal mechanisms, and delegate broad authority to independent legal entities to implement the rules they contain.⁷ Delegation mechanisms greatly strengthen the enforceability of international law. When states ratify a treaty with automatic jurisdiction, they formally commit to accept independent legal institutions as the highest authority in adjudicating

⁷ The journal of *International Organization* dedicated a special issue on legalization in 2000. For detailed discussions on the definition of legalization and hard law, see, for example, Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, 'Introduction: Legalization and World Politics', *International Organization* 54 (3), (2000), pp. 385-99; Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of Legalization', *International Organization* 54 (3), (2000), pp. 401-419; Kenneth W. Abbott, and Duncan Snidal, 'Hard and Soft Law in International Governance', *International Organization* 54 (3), (2000), pp. 421-456.

disputes. Especially when private actors, such as individuals, firms, and NGOs, can bring cases directly to international courts or arbitration panels, states' decision-making autonomy and sovereign rights are further limited.⁸

As sovereignty can be viewed as a set of control rights over territory, population and all types of political, economic, and social affairs within a state's own boundaries,⁹ delegating decision-making authority and accepting the mandatory jurisdiction of an international institution requires a state to give up some portion of its control rights and bear the costs of sovereignty loss. Therefore, sovereignty costs in this paper is defined as the costs for a state to cede sovereign control rights and policy autonomy to other parties.¹⁰ Everything else being equal, hard laws with precise provisions, binding obligations, and delegation mechanism encroach more on state sovereignty and thus impose higher sovereignty costs than soft laws do.

The ICC created by the Rome Statute is an institutional innovation and breakthrough in the areas of international human rights and criminal law. Four major features stipulated in the Rome Statute make the treaty a hard law and the ICC a very strong and independent court. First and foremost, the ICC has inherent and compulsory jurisdiction over four types of core crimes if *either* the territorial state (within whose borders the alleged crime has been committed) *or* the

⁸ Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', *International Organization* 54 (3), (2000), pp. 457-488.

⁹ Carlson, *Unifying China, Integrating with the World*, p. 11; Alexander Cooley and Hendrik Spruyt, *Contracting States: Sovereign Transfers in International Relations* (Princeton: Princeton University Press, 2009), p.4.

¹⁰ Other similar definitions of sovereignty costs can be found in Abbott and Snidal, 'Hard and Soft Law in International Governance', p. 436; Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000', *International Organization* 60 (4), (2006), p. 852; Beth A. Simmons and Allison Danner, 'Credible Commitments and the International Criminal Court', *International Organization* 64 (2), (2010), p. 233.

suspect state (nationality of the suspect) is a state party to the Statute.¹¹ This means that the Court will have jurisdiction over crimes as long as *one* of the above two states ratifies the treaty, even if the other state is not a party. Moreover, even if neither of the above states ratifies the treaty, the ICC can still exercise jurisdiction when the crime is referred to it by the UNSC. Thus, not only will states parties automatically accept the Court's jurisdiction upon ratification or accession, but non-party states may also be subject to the Court's rule in certain circumstances.¹²

Second, in terms of the relations between the ICC and national courts, although the Rome Statute designates the ICC as a complement to national courts in adjudicating crimes, it can step in to conduct an investigation and open a trial if the Court decides that a state or national court is "unwilling or unable" to prosecute matters on its own.¹³ Third, the triggering mechanism of crime investigation grants the Prosecutor of the ICC the right *ex officio* to start an investigation. The Prosecutor can investigate a crime not only when a situation is referred to him/her by states parties or by the UNSC, but also when he/she gets the consent of the Pre-Trial Chamber of the Court on the basis of information received from other sources, such as individuals or NGOs.¹⁴ Finally, the Rome Statute does not allow any substantive reservations for states to opt out of their

¹¹ International Criminal Court (hereinafter ICC), *Rome Statute of the International Criminal Court* (hereinafter *Rome Statute*), The Hague: International Criminal Court (2001), p.10.

¹² A good example is the Libya case. Libya voted against the Rome Statute at the Rome Conference and thus is not a state party of the treaty. Yet the ICC issued an arrest warrant for Libya's former Leader Colonel Gaddafi, his son Saif al-Islam, and Abdullah al-Senussi, head of Libya's state security services, based on UNSC Resolution 1970, which referred Libya's situation to the ICC.

¹³ ICC, *Rome Statute*, p. 13.

¹⁴ *Ibid.*, p. 11.

obligations.¹⁵ States must accept the treaty as a whole and cannot selectively accept treaty provisions when ratifying or acceding to the Rome Statute.

The Rome Statute of the ICC as a legalized international treaty is important for studying the relations between China and the international society because hard laws with high sovereignty costs are better settings than soft institutions for researchers to evaluate the *depth* of China's integration as well as the *relative weights* of the traditional Westphalian sovereignty and rising boundary-transgressing norms¹⁶ in determining China's foreign policy. Prior literature on China's integration with the world has shown that China's interests, behaviors, and policies have changed notably in almost every issue area.¹⁷ Nevertheless, most studies mainly focus on China's behaviors in soft institutions and use China's own behaviors at the very beginning of its economic reform as a benchmark to gauge its changes. As soft institutions and laws do not

¹⁵ Ibid., p. 72.

¹⁶ This concept is borrowed from Allen Carlson, who differentiates "boundary-reinforcing" and "boundary-transgressing" behaviors, policies, and norms. The former constructs "the division between internal and external affairs by emphasizing the inviolability of sovereignty rights"; while the latter blurs the division by promoting or acknowledging the malleability of state sovereignty. Carlson, *Unifying China, Integrating with the World*, p. 24.

¹⁷ Besides the aforementioned literature on China's relations with the international human rights regime in footnote 1, 2, and 3, other exemplary, but not a complete list of studies on China and the world includes Samuel Kim ed. *China and the World: Chinese Foreign Relations in the Post-Cold War Era* (Boulder, CO: Westview Press, 1994); Elizabeth Economy and Michel Oksenberg eds., *China Joins the World: Progress and Prospects* (New York: Council on Foreign Relations Press, 1999); Alastair Iain Johnston, 'Is China a Status Quo Power?' *International Security*, 27 (4), (2003), pp. 5-56; Johnston, *Social States: China in International Institutions, 1980-2000* (Princeton, N.J.: Princeton University Press, 2008); Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford, Calif.: Stanford University Press, 2007); James Reilly, 'A Norm-Taker or a Norm-Maker? Chinese Aid in Southeast Asia', *The Journal of Contemporary China*, 21 (73), (2010), pp. 71-91.

require strong binding obligations and states are usually willing to cooperate if participation does not impose high sovereignty costs, such settings cannot help us to effectively evaluate how China will behave if it has to cede significant portions of control rights. Therefore, soft laws tend to “bias” our findings toward pro-social changes rather than the stickiness of sovereignty norms in preventing changes and slowing down China’s socialization process.

In contrast, a hard law with high sovereignty costs is the *hardest* socialization test for a potential “socializee” to pass. The *more* a state is socialized by boundary-transgressing norms, the higher sovereignty costs it can bear to conform to new norms, and the *more* likely it supports binding treaty obligations and mandatory delegation mechanism in relevant issue areas. If a state only bears low sovereignty costs and does not want to take on any substantive binding legal obligations, it is unlikely to enter into the stage of strong socialization and truly internalize boundary-transgressing norms. Because the ongoing trend of legalization in today’s world indicates that the international society has reached new institutional and normative equilibriums in many issue areas, and because China is by no means an outsider in the world anymore, it is time to adopt the higher benchmark of legalization to gauge the depth of its integration and the limits of its deviation from sovereignty norms.

China’s positions on the ICC during the negotiations

China generally supported the establishment of a permanent international criminal court. What it opposed with the 1998 Rome Statute were the format and jurisdiction of the Court. It preferred a soft treaty and a conservative model of the ICC with limited jurisdiction over limited types of crimes. By a detailed analysis of Chinese delegates’ public statements in UN Sixth Committee’s meetings from 1993 to 1998 and at the Rome Conference in 1998, this section will show that China’s positions on the ICC reflected an overarching normative frame of state sovereignty; it was even reluctant to view the establishment of the ICC as a human rights issue, but tended to

perceive it as war-related security politics. As a result, China's positions diverged greatly from the Rome Statute on four major issues regarding the power and status of the Court: the relations between the ICC and national courts; the Court's inherent and mandatory jurisdiction; the Prosecutor's *ex officio* right to investigate crimes (i.e. the triggering mechanism); and the scope of crimes under the Court's jurisdiction.

First, Chinese negotiators insisted that the relations between the ICC and national court should be defined by "the most important guiding principle" of complementarity, which means the ICC "*could function only as an adjunct to national courts*" and should not exercise its jurisdiction "when a case was already being investigated, prosecuted or tried by a given country" (italics mine).¹⁸ As Chinese delegate Chen Shiqiu elaborated the principle, the court should apply its jurisdiction only "when it was impossible for national courts to formally try someone accused of a serious international crime... The international criminal court should not supplant national courts, nor should it become a supranational court or act as an appeal court for national court judgements".¹⁹

Although the Rome Statute recognizes the "complementarity" principle in its Preamble and Article 17 stipulates that the Court could intervene only when national courts were "unwilling or unable genuinely to carry out the investigation or prosecution",²⁰ Chinese delegates believed that this article and other substantive treaty provisions actually violated the principle and overrode state's judicial sovereignty. They suggested that the ICC should apply its jurisdiction only when

¹⁸ United Nations (hereinafter UN), *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Vol. II* (New York: UN, 1998a), p. 75; UN, *UN Document A/C.6/51/SR.28* (New York: UN, 1996), p. 20.

¹⁹ UN, *UN Document A/C.6/50/SR.25* (New York: UN, 1995), p. 13.

²⁰ ICC, *Rome Statute*, p. 13.

national courts were “unable” to try a case—i.e., “in the event that a State’s judicial system collapsed”²¹—but have no rights to judge whether a national court is “unwilling” to take an action or whether an investigation or prosecution by a national court is fair. However, Article 17 stipulates that the Court can judge the ongoing legal proceedings of any state, including a non-party; and if it decides that intention exists to shield a crime or the trial is not fair, it can exercise its jurisdiction and retry a case.²² Chinese negotiators strongly opposed this Article. They argued that allowing the ICC to judge the judicial system and legal proceeding of a state and to negate the decision of a national court actually makes the Court “an appeals court sitting above the national court”, and that “it was highly possible that such a provision would be abused for political purposes”.²³

Second, Chinese delegates had “serious reservations” concerning the inherent and mandatory jurisdiction of the Court, which “directly infringed on the judicial sovereignty of States”; they argued that the acceptance of the Court’s jurisdiction must “be in accordance with the principle of State sovereignty” and “based on the voluntary consent of States Parties”.²⁴ As delegate Duan Jielong said in 1997, “the inherent jurisdiction of the court, when extended to cover all core crimes, would accord precedence to the court over national courts; that was clearly at variance with the principle of complementarity and could adversely affect the cooperation between States and the court and the effective functioning of the court”.²⁵ During the negotiations, Chinese delegates promoted an “opt-in” mechanism, which would allow states the

²¹ UN, *UN Document A/C.6/53/SR.9* (New York: UN, 1998b), p. 6.

²² ICC, *Rome Statute*, p. 13.

²³ UN, 1998b, p.6.

²⁴ *Ibid.*, p.5; UN, *UN Document A/C.6/51/SR.28* (New York: UN, 1996), p. 20; UN, 1995, p. 14.

²⁵ UN, *UN Document A/C.6/52/SR.11* (New York: UN, 1997), p. 12.

freedom to choose whether and for which crimes they would like to accept the Court's jurisdiction.²⁶ Under this mechanism, the ICC could exercise its jurisdiction over only states parties that had given their pre-consents upon ratification.

However, Article 12 of the Rome Statute requires all states parties to automatically accept the ICC's jurisdiction. Moreover, even if a state is not a party to the Statute, it cannot completely avoid the Court's jurisdiction.²⁷ Such a provision is far beyond the positions of the Chinese government. As a Chinese delegate maintained, it not only granted the ICC mandatory jurisdiction over states parties, but also "imposed an obligation upon non-parties and constituted interference in the judicial independence or sovereignty of States".²⁸

Third, Chinese delegates intended to narrow the definitions of core crimes and limit the scopes of crimes that fall into the Court's jurisdiction. They especially opposed the inclusion of "domestic armed conflicts" and "violation of human rights in peaceful time" within the definitions of war crimes and crimes against humanity respectively, asserting that "the criteria determining jurisdiction [should be] the universality of the consequences of the crime and the seriousness of the crime", and "*what the international community needed at the current stage was not a human rights court but a criminal court that punished international crimes of exceptional gravity*" (italics mine).²⁹

Chinese delegates tended to perceive the establishment of the ICC from a security rather than a human rights perspective, and suggested that only *armed conflicts in international setting* could be serious and extensive enough to justify the concern of the entire international society,

²⁶ UN, *UN Document A/C.6/48/SR.19* (New York: UN, 1993), p. 5.

²⁷ ICC, *Rome Statute*, p. 10.

²⁸ UN, 1998a, p. 123-124.

²⁹ UN, 1995, p. 14; UN, 1998b, p. 6.

while human rights violations in domestic contexts or in peaceful time would not. As delegate Qu Wensheng argued:

The Rome Statute failed to link those crimes to armed conflicts and thereby changed the major attributes of the crimes. In listing specific acts constituting crimes against humanity, *the Statute added a heavy dose of human rights law...The injection of human rights elements would lead to a proliferation of human rights cases, weaken the mandate of the Court to punish the most serious crimes and thus defeat the purpose of establishing such a court* (italics mine).³⁰

Fourth, Chinese negotiators did not agree that the Prosecutor should have the right *ex officio* to initiate an investigation based on information received from any sources, such as NGOs and individuals, insisting that only states parties and the UNSC could refer cases to the Court. The Chinese government's major concern regarding the triggering mechanism was that an independent Prosecutor and broader access to the Court by all types of state and non-state actors may lead to the abuse of the Court and the encroachment of state sovereignty.³¹

As Chinese decision makers perceived states as major actors of the international society, they did not think that non-state NGOs and individuals should enjoy the same legal status. Moreover, they indicated that those actors would not focus on the most serious crimes with universal consequences, but would provide information regarding less serious domestic human rights violations in peaceful time to divert the Court's attention. As delegate Qu Wensheng stated in a Six Committee's meeting in 1998:

“Article 15 ... empowered individuals, non-governmental organizations and other bodies to bring cases before the Court and *gave them virtually the same right as States parties and the Security Council to trigger the Court's jurisdiction mechanism. As a result, the Court would be faced with a huge number of complaints from individuals and non-governmental organizations*, and therefore would not be able to concentrate its limited resources on dealing with the most serious international crimes” (italics mine).³²

³⁰ Ibid., p. 6.

³¹ UN, 1998a, p. 5; UN, 1998b, p. 6.

³² Ibid., p. 6.

More importantly, if the Prosecutor could initiate investigations *proprio motu* on the basis of information provided by those actors, “that means that *the authority of the Prosecutor was so extensive that he or she could influence or interfere with the judicial sovereignty of a State*” (italics mine).³³ Therefore, as maintained by Wang Guangya, Head of the Chinese delegation to the Rome Conference, “a cautious approach should be adopted when addressing such questions as trigger mechanisms and means of investigation, in order to avoid irresponsible prosecutions that might impair a country’s legitimate interests”.³⁴

Although huge gaps existed between China’s stances and major provisions of the Rome Statute, China was not always among a minority group and many of its positions were shared by other great powers, such as the United States. In fact, the institutional feature of the Rome Statute is a puzzle for many political observers, because the original draft statute proposed by the International Law Commission (ILC)—authorized by the UN General Assembly to draft the law—in 1994 was a very soft law and prioritized state sovereignty in almost every dimension.³⁵ During the negotiation, two key groups emerged with divergent opinions. One was under the leadership of the Permanent Members of the UNSC (P5 group³⁶), which dominated the negotiation process in the early period. The ILC draft reflected mainly the preference of this

³³ Ibid., p.6.

³⁴ UN, 1998a, p. 75.

³⁵ Nicole Deitelhoff, ‘The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case’, *International Organization* 63 (1), (2009), pp. 33-65; Jay Goodliffe and Darren Hawkins, ‘A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations’, *The Journal of Politics*, 71 (3), (2009), pp.977-997.

³⁶ P5 denotes a group of states sharing similar conservative opinions to those of the five permanent members of the UNSC, but does not mean the five permanent members only.

group and its major provisions were very close to China's positions. The other was the Like-Minded (LM) group, composed of small and middle powers and supported by a global NGO coalition, the Coalition for an International Criminal Court (CICC). This group advocated a strong and independent court and its voices and influence had started to increase since 1997.

According to Deitelhoff, the turning point appeared only one year before the Rome Conference and was mainly due to a series of regional conferences sponsored by the LM group and the CICC in Latin America, Africa, and Central and Eastern Europe. Those regional conferences were designed as informal forums to exchange ideas among government officials, NGOs, and experts outside the formal UN-based negotiation settings, but they resulted in "unexpectedly progressive positions toward the ICC that were almost identical to those of the LM group".³⁷ Moreover, the switch of positions of the UK and French delegations after the changes in their government in 1997 dismantled the great-power coalition and greatly contributed to the shift in the international normative equilibrium and the balance of power between the two groups during the last year of the negotiation. The views of the LM Group eventually prevailed at the Rome Conference, and the Rome Statute differs radically from the original soft ILC draft. As a result, both the United States and China cast negative votes.

Although great powers in general do not want to delegate sovereignty to a higher international authority, relative power is not the only important factor determining states' preferences, as the underlying reasons for great powers to uphold sovereignty norms are different. For example, the United States shared similar positions on major treaty provisions with China; yet unlike China, US human rights protection in domestic arena is highly institutionalized and the chances for US leaders to be prosecuted due to domestic human rights violation or

³⁷ Deitelhoff, 'The Discursive Process of Legalization', p. 56.

humanitarian disasters are very low. What concerns the US the most is to exempt its leaders and military personnel from the ICC's jurisdiction when its troops carry out military operations outside the US territory. As its lead negotiator, Ambassador David Scheffer, stated "the treaty purports to establish an arrangement whereby United States Armed Forces operating overseas could be conceivably prosecuted by the international court ... it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives."³⁸ In contrast, China's human rights violations are more likely to happen in domestic settings, and accepting the legalized Rome Statute would increase the chances of China's domestic affairs being interfered by international legal authorities. In certain extreme situations, the mandatory jurisdiction of the ICC may even threaten China's territorial integrity and regime legitimacy; therefore, the political reasons for China to oppose the ICC are more defensive and inward-looking.

Superiority of state sovereignty over human rights

China's negative attitude and strong opposition toward major boundary-transgressing treaty provisions during the negotiation of the ICC indicate that Chinese leaders still prioritize state sovereignty when discussing human rights and humanitarian issues. Although China has actively participated in the international human rights regime and softened its stance on sovereignty since the late 1970s, its leaders' acceptance of human rights norms has been limited and restrained, because they tend to perceive those norms as intertwining with issues regarding China's core sovereignty and as potential instruments used by "Western/international hostile forces". Core sovereignty is the most important and indivisible sovereign control rights that constitute a state's

³⁸ "Is U.N. International Criminal Court in the U.S. National Interests?" Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, US Senate, 105th Congress (July 23, 1998).

core national interests.³⁹ In China's case, Chinese leaders always attach the most importance to China's regime security and territorial unification, especially regarding jurisdiction over Taiwan, Tibet, and Xinjiang, and their stances on those issues have rarely softened since the establishment of the PRC.⁴⁰

The superiority of state sovereignty and the limited degree to which Chinese leaders internalize human rights norms are most evident in former President Jiang Zemin's discourses on human rights. In the three-volume *Selected Works of Jiang Zemin*,⁴¹ twenty-six articles written between 1989 and 2000—a time period covers the international negotiation on the establishment of the ICC—reference the concept of “human rights [*renquan*]”. In nineteen (more than 80%) of those articles, “human rights” and “humanitarianism” are explicitly or implicitly associated with “Western states” or “Western/international hostile forces” and treated as their tools to

³⁹ For detailed discussion of the distinction between core and non-core sovereignty, see for example, Yizhou Wang, ‘Shuli shiji zhijiaode xin zhuquanguan [Establish a New Sovereignty Perspective for the New Century]’, *Liaowang xinwen zhouban [Outlook Newsweek]* 17 (2000), pp. 8-11; Yizhou Wang, ‘Zhuquan fanchou zaisikao [Rethinking the Connotation of Sovereignty]’, *Ouzhou [Europe]* 6 (2006), pp. 4-11.

⁴⁰ See, for example, Allen Carlson, ‘Constructing the Dragon's Scales: China's Approach to Territorial Sovereignty and Border Relations in the 1980s and 1990s’, *The Journal of Contemporary China*, 12 (37), (2003), pp. 677-698; M. Taylor Fravel, *Strong Borders, Secure Nation: Cooperation and Conflict in China's Territorial Disputes* (Princeton: Princeton University Press, 2008); Yufan Hao and Weihua Liu, ‘Xinjiang: Increasing Pain in the Heart of China's Borderland’, *The Journal of Contemporary China*, 21 (74), (2012), pp. 205-222; Alastair Iain Johnston, ‘How New and Assertive Is China's New Assertiveness?’ *International Security*, 37 (4), (2013), pp. 7-48.

⁴¹ Jiang's works was edited and completed under the personal guidance of his successor Hu Jintao and the Political Bureau of the CCP Central Committee. It represents not only the personal beliefs and preferences of Jiang himself, but also the consensus and collective efforts of the CCP's ideological machine. Therefore, it is an authoritative and reliable ideological source for us to trace the norms and ideas advocated by the center of the CCP, the degree to which Chinese leaders internalize different norms, and the official lines on many important policy issues.

“Westernize and divide [*xihua fenhua*] China”⁴² or to “interfere domestic affairs [*ganshe neizheng*]” of China and developing countries. The seven articles that do not attribute any instrumentalist meaning to human rights indeed recognize positive values of those norms; yet six of them have qualifications, either emphasizing the superiority of state sovereignty or the relative meaning of this concept.⁴³

Viewing human rights as potential threats to China’s regime security and unification imposed by Western countries shows that Chinese leaders have a strong sense of insecurity when facing those norms and relevant issues.⁴⁴ Because of regime and ideological differences between China and its Western counterparts, Chinese leaders have profound distrust for the West, believing that Western/international hostile forces “view China as a thorn on their side”,⁴⁵ “do not want to see a socialist China becoming unified and stronger”,⁴⁶ “and will not stop attacking China and interfering China’s internal affairs”.⁴⁷ Such a sense of insecurity has greatly influenced their perceptions on the relations between human rights, regime security, and state sovereignty. As Jiang Zemin said in a CCP Central Committee’s meeting in 2000,

Nowadays, China is the biggest socialist state in the world and has continuously developed and become increasingly wealthier and stronger. Western hostile forces have intensified all types of means and measures to implement the political strategy of

⁴² “Westernizing China” refers to threats to China’s one-party regime and CCP’s leadership, and “dividing China” refers to threats to China’s territorial and national unification.

⁴³ The only article that does not impose any conditions on the legitimacy of human rights and humanitarianism is discussing the rights of disabled people—the least politicized minority group in China.

⁴⁴ Russell Ong, “Peaceful Evolution”, “Regime Change” and China’s Political Security’, *The Journal of Contemporary China*, 16 (53), (2007), pp. 717-727.

⁴⁵ Jiang Zemin, *Jiang Zemin wenxuan [Selected Works of Jiang Zemin]*, vol. 3, (Beijing: People’s Press, 2006), p. 8.

⁴⁶ *Ibid.*, p. 139.

⁴⁷ *Ibid.*, p. 235.

Westernizing and dividing our country, and sought to sabotage CCP's leadership and China's socialist regime. ... *In recent years, they have ceaselessly made use of the so-called "human rights", "democracy", "freedom", "ethnic" and "religious" issues as well as Dalai Lama and the Taiwan issue to launch attacks on us. They have also colluded with those so-called overseas "pro-democracy activists" and our domestic hostiles and attempted to take joint actions with those people (italics mine).*⁴⁸

Jiang's statement reveals that Chinese leaders not only perceive the West as potentially hostile forces, but also view domestic and overseas "dissents" and "secessionists/separatists" (usually ethnic minorities from Tibet and Xinjiang as well as "Taiwan-independence forces [*taidu shili*]") as internal and external enemies, who are most likely to attract international attention and are empowered by international human rights norms and humanitarian practices. Therefore, in Chinese leaders' eyes, human rights and humanitarianism as well as other values of democracy and liberty have never been purely about individual Chinese people's rights and freedom, but intertwined with other more dangerous and explosive ethnic, religious, and territorial issues, such as Tibet and Taiwan, and can therefore be used by both international and domestic "enemies" to challenge China's national unification and regime security. Jiang Zemin specifically pointed out this threat in the article titled "On Works Concerning Ethnic Affairs":

In China's modern history, *ethnic secessionist movements have always been provoked by foreign invading forces, and ethnic secessionists have always been the internal agents of foreign invading forces to seize our territories in boarder areas...* We must ... strongly oppose and expose the evil activities of "*Taiwan independence*" forces; and be aware of and against the conspiracies of some international forces that support exiled secessionists, make use of "*Pan-Islamism*", "*Pan-Turkism*", or other flags, and incite secessions in some areas of our country... A small number of separatists have ... never ceased their activities of dividing China. *They collude with external hostile forces, coat with religions, and wave the banner of "democracy, freedom, human rights" and ethnic unification to provoke chaos and riots and to undermine the stability and unity of Tibet; they fabricate all types of lies, deceive*

⁴⁸ Jiang, Vol. 2, p. 83. Jiang made similar comments on the Western threats to China's regime security and unification on various occasions. See, for example, *Ibid.*, p. 521-522; vol. 3, p. 235.

people who do not understand the truth, and coin the so-called “*Tibet issue*”, in order to “internationalize” the problem (italics mine).⁴⁹

Because of the potential threats that the rising norms of democracy, freedom, and human rights may impose on China’s core sovereignty of territorial integration and regime legitimacy, Chinese leaders’ recognition of the universality of those ideas has often been restrained. Although nowadays ever more developing countries have democratized, Chinese leaders have still tended to associate the democratization movements in the third world with the “sinister motives” of the West and believed that blindly embracing those “Western” ideas will do more harm than good to developing countries.⁵⁰ As Jiang Zemin said in a speech on China’s strategic relationship with the third world in 2000:

Since the end of the Cold War, *the West has intensified the political strategy of “Westernizing and dividing” the third world, waved the flags of “democracy”, “freedom”, and “human rights”, and forced developing countries to adopt Western-style multi-party regime.* Being impacted by the so-called ‘democratization’ waves, many countries have experienced political unrests, delayed economic development, and the increase of conflicts caused by ethnic, religious and territorial disputes. Those are the results of swallowing the “political poison” of copying Western political systems without considering domestic situations (italics mine).⁵¹

Nevertheless, the spread of the norms of democracy, liberty, and human rights at the global level has significantly changed China’s external normative and institutional environments, making Chinese leaders more responsive to international pressures and more open to commonly accepted standards and practices. Chinese leaders have been more likely to recognize the legitimacy of human rights norms and show their support to international humanitarian activities if doing so will not harm China’s core sovereignty. In examining Jiang Zemin’s discourses on human rights, five of the seven articles that do not attribute instrumentalist meanings to human

⁴⁹ Jiang, vol. 1, p. 190-191.

⁵⁰ Jiang, vol. 2, p. 371.

⁵¹ Ibid., p. 371.

rights are speeches and talks Jiang gave in *international arenas*; while sixteen of the nineteen articles that associate the concept with Western or international hostile forces are targeting exclusively *domestic audiences*. These differences indicate that although Chinese leaders tend to view those norms and relevant issues as tools of the West, they are also aware of their widespread legitimacy at the global level and intend to show China's support of human rights norms and humanitarian practices when facing international audiences.

For example, when Jiang Zemin spoke on the relations between human rights and sovereignty at the UN Millennium Summit in 2000, he recognized that “the full realization and enjoyment of human rights is the common ideal pursued by the entire human race. Any country will have obligations to promote and protect human rights and basic freedom of its own people, in accordance with international human rights treaties as well as its own national situations and relevant laws”.⁵² However, due to their concerns about the potential misuse of human rights norms by both domestic and international “hostile forces”, Chinese leaders’ acceptance of those norms is under the condition that human rights goals must not supersede state sovereignty.⁵³ In a different speech Jiang Zemin gave at the UN Millennium Summit in 2000, he mentioned the concept three times, yet each time prioritized state sovereignty over human rights:

The dialogues regarding human rights issues must be carried out on the basis of respecting state sovereignty; this is the most fundamental and effective ways to protect and promote human rights causes. As long as there exist state borders in the world and people live in their own countries, protecting national independence and

⁵² The title of the speech, however, is “State Sovereignty is the Precondition and Safeguard for the People of a State to Fully Enjoy Human Rights”. In this talk, Jiang also states, “The Chinese people have deeply understood that if a country cannot protect its sovereignty, it cannot talk about human rights at all. Therefore, we especially cherish the liberation and state sovereignty gained with blood and lives through long-time struggles by the Chinese people”. Jiang, vol. 3, p. 113, 114.

⁵³ See, for example, Jiang, vol. 1, p. 123, p. 244, p. 479; vol. 2, p. 52, p. 55; vol. 3, p. 113-114.

sovereignty is the highest interest of every national government and its people. Human rights cannot be discussed without sovereignty (italics mine).⁵⁴

Moreover, Chinese leaders tend to emphasize the relative meanings of those boundary-transgressing norms, viewing the realization of human rights as contingent on the socio-economic status of each state and treating “sustainability and development [*shengcun quan he fazhan quan*]” as the most important rights of the Chinese people.⁵⁵ As Jiang said in a luncheon speech when he visited the United States in 1997, “China is a developing country with more than 1.2 billion population; *this national situation determines that the rights of sustainability and development are the most fundamental and important human rights in China*. If the problem of how to feed the people and keep them warm cannot be solved, it is impossible to pursue other types of rights” (italics mine).⁵⁶

The high percentage of Jiang Zemin’s works viewing human rights as tools of “hostile forces” to “Westernize and divide China” indicates that Chinese leaders consider more of the potential negative impacts of those norms on China than their positive and universal values. Although they have been more open to human rights and more responsive to international pressures in recent decades, their internalization of those norms has been relatively limited, and it is impossible for China to take on international human rights and humanitarian obligations imposing high sovereignty costs on states.

High sovereignty costs of the Rome Statute on China

Besides the limited degree of Chinese leaders’ internalization of human rights norms, the unprecedented boundary-transgressing and legalized features of the treaty itself is an important

⁵⁴ Jiang, vol. 3, p.110-111.

⁵⁵ See, for example, Jiang, vol. 1, p. 334, p. 338; vol. 2, p. 52, p. 54, p. 56.

⁵⁶ *Ibid.*, p. 53.

reason that China rejected the Rome Statute. The treaty reflects more liberal human rights views and is in conflict with China's preferences in almost all dimensions. Major boundary-transgressing treaty provisions may increase the chances that China's "internal" affairs become "internationalized", empower non-state NGOs and individual rights activists, and thus constrain China's autonomy to handle sensitive issues concerning its core sovereignty. Moreover, as the Rome Statute does not allow any flexible arrangements or reservations for China to lower sovereignty costs, China did not recognize the legitimacy of the treaty and eventually voted against it at the Rome Conference.

Implications of the definitions of core crimes on China

Because the dominant concern for Chinese leaders regarding human rights issues is the potential danger that those norms will be used by "hostile forces" to interfere in China's domestic affairs, Chinese delegation's focus during the negotiation was to minimize this possibility by limiting the jurisdiction and authority of the court vis-à-vis sovereign states. In terms of the definition of core crimes, if the scope of those crimes cannot be restrained to *war-related* humanitarian issues in *international* contexts, some of Chinese government's actions of handling internal affairs, such as suppressing dissidents and separatists, and even taking Taiwan by force, may fall under the ICC's jurisdiction and incur the intervention of the Court.

For example, Article 7 of "Crimes Against Humanity" specifies eleven types of crimes "committed as part of a widespread or systematic attack directed against any civilian population". It includes many human rights violations, such as torture, enforced disappearance, sexual violence, and imprisonment and deprivation of physical liberty in violation of fundamental rules of international law; but it does not limit the definition of crimes in wartime.⁵⁷ Had China

⁵⁷ ICC, *Rome Statute*, p. 3-5.

become a state party of the Statute, this article might have tied its hands to suppress political dissidents or to deal with threats to its territorial unification, especially in ethnic minority regions.

The situations most likely to be referred to the ICC in the name of “crime against humanity” are issues related to the suppression of political riots in Tibet and Xinjiang, given that Chinese leaders tend to take strong measures to maintain political and social stability in ethnic minority regions. As Jiang Zemin emphasizes, “[we must] forcefully strike secessionist movements and crimes in Tibet; handle emergencies firmly, resolutely, and promptly; and nip potential riots in the bud. Be highly alert to the infiltration and sabotage activities of international hostile forces and the Dalai Group and crack them down once they are detected.⁵⁸ In terms of Xinjiang, “we must unite together, strongly oppose and forcefully clamp down activities that destroy ethnic and national unification ... We must not hesitate or compromise even slightly on such critical issues”.⁵⁹

Had China become a member state of the Rome Statute, overseas ethnic minorities as well as other state and non-state actors would have resorted to the ICC to sue Chinese leaders and challenge the legitimacy of the government’s actions. As Tan Shigui, a leading scholar on criminal law, maintains, although human rights acts concerning China had constantly been defeated at the UN Commission on Human Rights, “[Western anti-China forces] do not submit to defeat. The establishment of the International Criminal Court undoubtedly allows [them] to

⁵⁸ Jiang, vol. 1, p. 394-395.

⁵⁹ Jiang, vol. 2, p. 158.

see new ‘hopes’, and the crime against humanity within the ICC’s jurisdiction may also become ‘judicial weapons [sifa wuqi]’ for them to interfere China’s internal politics”.⁶⁰

Besides Article 7 on crimes against humanity, the inclusion of “domestic armed conflicts” in the category of war crimes could also have negative impacts on China’s core sovereignty regarding the Taiwan issue, weakening China’s deterrence strategy, empowering pro-independence forces, and even enabling the ICC to exercise jurisdiction in the event of China resorting to force to achieve national reunification. In order to deter Taiwan from pursuing *de jure* independence, the Chinese government had long before declared its position that it would not give up military force to solve the Taiwan issue. As Deng Xiaoping said in 1979, “we try to use peaceful means to bring Taiwan back to the motherland and achieve national unification. The problem is that if we promise that we will not use military forces, it will tie our hands and make the Taiwan authorities refuse to negotiate with us for peaceful reunification. This will in turn lead to the use of military force to solve the problem”.⁶¹ This deterrence strategy was further strengthened and legalized in China’s Anti-Secession Law in 2005. Article 8 of the Law says, “in the event that the ‘Taiwan independence’ secessionist forces should act under any name or by any means to cause the fact of Taiwan’s secession from China, or that major incidents entailing Taiwan’s secession from China should occur, or that possibilities for a peaceful reunification

⁶⁰ Shigui Tan, ‘Zhongguo yu guoji xingshi fayuan guanxi chutan [An Analysis of the Relations between China and the ICC]’, In Bingzhi Zhao, Xiumei Wang and Sanjeewa Liyanage, eds., *Guoji xingshi fayuan zhuanlun [Study on Major Issues Relating to the ICC]* (Beijing: People’s Court Press, 2003), p. 68.

⁶¹ State Council of the People’s Republic of China, ed., *Taiwan wenti wenxian ziliao xuanbian [Selected Works of the Literature on the Taiwan Issue]* (Beijing: People’s Press, 1994), p. 154.

should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity".⁶²

As the definition of war crimes of the Rome Statute does not exclude domestic armed conflicts, the Chinese government using military force to reunite with Taiwan might have fallen into the Court's jurisdiction and incurred its investigation. As Zhang Lei, a Chinese expert on the ICC at Beijing Normal University, states: if the Taiwan authority pursues independence, "the Chinese government must resort to military force to solve the Taiwan issue, and armed conflicts will be inevitable. Such conflicts are similar to 'non-international armed conflicts' under the definition of war crimes of the Statute; once conflicts begin, international anti-China forces may make use of the ICC in the name of war crime to intervene, investigate, and even sue China's military actions of resuming Taiwan, and interfere China's internal politics... This is one of the major reasons that the Chinese government rejects the Statute and does not participate in the ICC".⁶³

In fact, the ICC has already been perceived by some pro-independence Taiwanese as an effective tool to counter China's deterrence strategy. On the same day that the ICC was established at The Hague on July 7, 2002, several human rights and pro-independence NGOs in Taiwan formed the Taiwan Coalition for the International Criminal Court. The Convener of the Coalition, Li Shengxiong, is also the secretary-general of the pro-independence organization, World United Formosans for Independence. Li argues in an article on war crimes: "Because China's violation of human rights has been well-known by the world and it also threatens

⁶² Xinhua Net, *Fan fenlie guojia fa [the anti-secession law]* (03/14/2005), http://news.xinhuanet.com/newscenter/2005-03/14/content_2694168.htm.

⁶³ Lei Zhang, *Zhongguo yu guoji xingshi fayuan: Xianzhuang yu zhanwang [China and the ICC: Status and Prospect]* (Beijing: People's Public Security University Press, 2009), p. 256-257.

Taiwan by more than 400 missiles and its military force, it does not dare to sign the Rome Statute and participate in the ICC. Therefore, Taiwan should become a member of the ICC as soon as possible, so as to not only safeguard international human rights, but also save ourselves from external invasions and wars, and avoid domestic events of genocide and crimes against humanity”.⁶⁴

Implications of Prosecutor’s ex officio right on China

Besides the definition of core crimes, the Chinese government also worries that the Prosecutor’s *ex officio* right and the free access of non-state actors to the ICC might weaken the government’s control over cases being referred to the Prosecutor and lead to legally binding rulings unfavorable to the Chinese government. These concerns are not unfounded. In fact, the international NGO coalition—the CICC—had played an indispensable role in advocating for an independent court and the legalized Rome Statute throughout the negotiations. CICC members took part in the Rome Conference and represented the largest delegation, with nearly 500 participants. The group currently includes 2,500 civil society organizations in 150 different countries, and it continuously works to strengthen international cooperation with the ICC.⁶⁵

Several CICC members are perceived by the Chinese government as potential “hostile forces” with the aim of “Westernizing and dividing China.” In addition to the aforementioned Taiwan Coalition for the ICC, Human Rights Watch and Amnesty International are two major

⁶⁴ Shengxiong Li, ‘Guoji xingshi fayuan shiyong luoma guiyue guandian lun zhanzheng zui [On War Crimes Based on ICC’s Application of the Rome Statute]’ (2003);

<http://www.wufi.org.tw/%E5%9C%8B%E9%9A%9B%E5%88%91%E4%BA%8B%E6%B3%95%E9%99%A2%E9%81%A9%E7%94%A8%E3%80%8E%E7%BE%85%E9%A6%AC%E8%A6%8F%E7%B4%84%E3%80%8F%E8%A7%80%E9%BB%9E%E8%AB%96%E6%88%B0%E7%88%AD%E7%BD%AA/>.

⁶⁵ Coalition for the International Criminal Court, ‘Our History’, <http://www.iccnw.org/?mod=cicchistory>.

influential NGOs that might provide information concerning China to the Court. Both organizations are founding members of the CICC and currently among its 16-member steering Committee. Ever since the Tiananmen Incident in 1989, both organizations have strengthened their scrutiny of China. In their annual reports on world human rights conditions, the China sections usually contain information about the government's maltreatment of political dissidents, human rights violations in ethnic minority regions, censorship, and suppression of non-official political and religious organizations. Among those issues, how the Chinese government treats ethnic minorities in Tibet and Xinjiang has attracted special attention. For example, the *World Report* published by Human Rights Watch has criticized the government's activities and policies in Tibet every year since 1989 and in Xinjiang almost every year since 1990; it has also started to comment upon political development and human rights conditions in Hong Kong since 1992.⁶⁶ As a result, Chinese leaders have always been vigilant against these groups and banned their organizations in mainland China.

Moreover, the Prosecutor's right to initiate investigation *proprio motu* based on information provided by non-state actors further increases the chance that the ICC would interfere in China's "internal" affairs and issue legally binding rulings unacceptable to the Chinese government. In order to check the Prosecutor's power and ensure that he/she would not represent "the West" or be used by "hostile forces", Chinese delegates proposed during the negotiations that the composition of judges in the Pre-Trial Chamber should represent all major legal systems and regions of the world, because without the consensus of the Chamber, the Prosecutor cannot start an investigation. However, the Rome Statute does not incorporate China's suggestion; this may increase the possibility that both the Prosecutor and the Chamber represent the values and voices

⁶⁶ Human Rights Watch, *World Reports* (1989-2013), <http://www.hrw.org/node/79288>.

of “Western countries”. As Chinese delegate Qu Wensheng explained China’s opposition to the Statute at a meeting of the Six Committee in 1998,

Although a Pre-Trial Chamber was provided for in the Statute with a view to preventing the abuse of authority by the Prosecutor, in order for such a mechanism to be effective, either the members of the Pre-Trial Chamber, or the members of the Chamber and the Prosecutor, should be the product of different legal systems and different political and cultural backgrounds. The Statute, however, contained no such provision. *It was possible, therefore, that both the members of the Pre-Trial Chamber and the Prosecutor might come from the same region or share the same legal, political or cultural background. That would neutralize the Pre-Trial Chamber’s check-and-balance role* (italics mine).⁶⁷

High sovereignty costs of compulsory jurisdiction of the ICC

Even if the definitions of core crimes and the Prosecutor’s *ex officio* right have strong boundary-transgressing features and Chinese leaders do not internalize human rights norms, China might have still been able to sign the Rome Statute or at least abstain, had the treaty adopted a flexible opt-in mechanism to allow states to choose whether and for which crimes they accept the ICC’s jurisdiction. Such a mechanism would significantly lower the sovereignty costs of the Statute and change the nature of the treaty from hard to soft law. In fact, before the Rome Statute, China had already signed 18 human rights treaties, and in the same year after China voted against the Statute, it also signed the ICCPR in October 1998. All those treaties are soft law in nature, incorporating flexible arrangements for states to lower sovereignty costs, and thus cannot match the degree of legalization of the Rome Statute.

For example, the 1984 Convention Against Torture (CAT) defines the crime of torture and stipulates a series of obligations for states, yet the “opt-in” reservation clause of the treaty allows states to voluntarily choose whether to accept the authority of the Committee Against Torture, a monitoring institute established by the CAT. Although CAT grants the Committee the right to

⁶⁷ UN, 1998b, p. 6.

investigate reports of torture submitted by either state or non-state actors on its own initiative through confidential inquiries and fact-checking missions in a state's territory, this right is conditional on the *pre-consent* of states. As Article 28 of the Convention states, "Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20".⁶⁸

If without this "opt-in" mechanism, the right of self-initiation of an investigation of the Committee based on information provided by states, individuals and NGOs would have resembled the *ex officio* right of the Prosecutor of the ICC, and the CAT would have imposed higher sovereignty costs on states than the current one does. Yet, because of the soft law nature of the CAT, China signed the treaty in 1986 and ratified it in 1987. Upon signature, China made a formal reservation that "the Chinese government does not recognize the competence of the Committee against Torture as provided in the article 20 of the Convention".⁶⁹

The CAT case as well as China's support to other soft human rights treaties demonstrate that even if Chinese leaders do not fully internalize human rights norms and are not ready to accept legally binding obligations, they are willing to show their support and follow the "majority will" of the international society as long as a treaty provides certain flexible mechanism allowing states to exempt issues concerning their core sovereignty. As Chinese leaders worry about China's international image and do not want to stay outside major international institutions, when negotiating the Rome Statute, Chinese delegates tried to promote an "opt-in" mechanism so that China could sign the treaty without necessarily accepting the ICC's jurisdiction. However,

⁶⁸ UN, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *UN Document A/RES/39/46* (New York: UN, 1984).

⁶⁹ UN, *Declarations and Reservations to the CAT*, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en#EndDec.

China's proposals could not gain support from the majority of states. And Article 120 also clearly states that "No reservations may be made to this Statute",⁷⁰ thus eliminating the possibility that China could exclude sensitive political issues from the Court's jurisdiction. Therefore, the Chinese delegation resolutely voted against the Rome Statute, even if the majority of states at the Rome Conference supported the treaty.

Conclusion

The Rome Statute of the ICC is the most legalized human rights treaty at the global level. The Statute creates a permanent and independent Court to prosecute individuals for genocide, aggression, war crimes, and crimes against humanity. The adoption and the entry into force of the treaty indicates that the international normative environment has changed greatly in recent two decades as the international society attaches more importance to human rights vis-à-vis state sovereignty.

However, China's positions on the Rome Statute are in conflict with all major treaty provisions, and reflect more conservative and sovereignty-centered views. Chinese leaders tend to perceive human rights and relevant issues as instruments of the West and "hostile forces" to "Westernize and divide" China. The sense of insecurity aroused by those boundary-transgressing norms has greatly restrained Chinese leaders' acceptance of their legitimacy. They tend to prioritize state sovereignty and pay greater attention to the negative impacts of human rights on China than to the universal values and positive meanings of those norms. In the meantime, major treaty provisions of the Rome Statute may have negative implications on China's core sovereignty, increasing the chances that situations concerning Tibet, Xinjiang, Taiwan, and other sensitive political issues would be referred to the Court. As the treaty does not allow any flexible

arrangements for China to exempt from the Court's jurisdiction, it imposes extremely high sovereignty costs on China.

China's rejection to the Rome Statute indicates that China is still in a weak socialization stage and its integration with the international human rights regime has not been deep enough for it to accept legally binding obligations with high sovereignty costs. Given that Chinese leaders tend to perceive the spread of human rights norms as a threat to its core sovereignty of territorial unification and regime security, their internalization of those norms will always been limited and restrained. Therefore, China's integration in the human rights regime will not be a linear process. It is unlikely to accept the Rome Statute and move from weak to strong socialization in the near future.